In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 372

ABRAHAM MAIUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried with another defendant, Tito Carinci, on an indictment having two counts charging both defendants with wilful attempts to evade income taxes of the Glen Corporation for the years 1959 and 1960, in violation of Section 7201 of the Internal Revenue Code of 1954, and two counts charging that petitioner wilfully and knowingly aided and assisted in, and counseled, procured and advised, the preparation and presentation to the In-

ternal Revenue Service of false and fraudulent income tax returns of the Glen Corporation for the same years, in violation of Section 7206(2) of the Internal Revenue Code of 1954. A jury convicted petitioner on all counts. He was sentenced to concurrent prison terms of three years and was fined a total of $15,000. (R. 1a-10a, 123a.)[1]

The Glen Corporation owned and operated a supper club and gambling casino in Newport, Kentucky (Pet. 4). Petitioner commenced working for the corporation early in 1959 (Supp. R. 114b), and became one of its stockholders (Supp. R. 79b-81b). He acted as bookkeeper (Supp. R. 84b-89b, 116b-121b) and made deposits and handled most of the banking business (Supp. R. 91b). According to government computations presented at the trial, Glen's corporate income was understated by $133,442.67 for 1959 and $97,467.21 for 1960. The additional tax due on the unreported income was $69,309.14 for 1959 and $46,585.72 for 1960 (Supp. R. 98b, 111b-112b).

During August 1962 Internal Revenue Service Special Agent Frank Coots was assigned to investigate income tax returns of the Glen Corporation. He and Internal Revenue Agent Robert Thomas interviewed petitioner on November 26, 1962, and on October 9, 1963. On those occasions petitioner explained accounting procedures of the corporation.

Prior to the first interview, Special Agent Coots had called petitioner by telephone, advised that he

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[1] "R" references are to the Appendix to petitioner's brief in the court of appeals. "Supp. R" references are to Appendix B to the Government's brief in the court of appeals.

was making an income tax investigation of the Glen Corporation, and asked petitioner to meet him and talk about the investigation. At the initial interview, Mr. Coots advised petitioner that he was a special agent, that an investigation was being conducted of the Glen Corporation, and that petitioner did not have to answer any questions if he thought the answers might tend to incriminate him. Petitioner said he wanted to answer any questions that might be asked of him. At neither of the two conferences was petitioner advised that he could have the assistance of counsel if he so desired. (Supp. R. 81b-89b, 91b-92b; R. 54a-57a, 64a, 111a.)

After some deliberation the jury reported to the court that it had found Carinci guilty on all counts, and, without describing the nature of the finding, that it had found on one count, but was unable to find on the three other counts, as to petitioner. The court then gave the jury a version of the so-called "Allen" charge. The judge inquired if the jury thought there was a chance it might be able to reach a verdict as to petitioner on the other counts. He asked if the jury would try again to reach a verdict on the three counts and the jury agreed to do so. It thereafter returned a verdict finding petitioner guilty on all four counts (R. 122a-125a).

Petitioner in no manner raised in the district court his present objections to the use of his statements to the Internal Revenue Agents and to the court's instruction to the jury. The Court of Appeals for the Sixth Circuit reviewed both objections as well as the sufficiency of the evidence, and affirmed.

No error exists. There is neither conflict among the circuits nor any other basis for review in this Court.

1. Petitioner, whose trial took place in July 1965, a year before this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, did not move to suppress or exclude the statements made to the agents. Even though the trial was after the decision in *Escobedo* v. *Illinois*, 378 U.S. 478, petitioner in no manner asserted at trial that he was deprived of any constitutional right. In these circumstances he may not rely on *Miranda*. *Johnson* v. *New Jersey*, 384 U.S. 719.

Petitioner's asserted reliance on *Miranda* in any event would be unfounded even if the procedural posture of the case made *Miranda* applicable. Petitioner voluntarily met with the agents of the Internal Revenue Service. He was not in custody or under any restraint. His decision to answer questions was voluntary. No contrary argument is made, even in this Court.

Petitioner therefore was not subject to any of the coercion or pressure that the rule of *Miranda* is designed to prevent. Under these circumstances, the agents had no constitutional obligation to advise him of a right to counsel. *E.g.*, *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[2] *Morgan* v. *United States* (C.A. 1), de-

[2] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it appears from Mr. Justice Doug-

cided May 16, 1967 (67-1 U.S.T.C., par. 9449).[3]

2. There is no substance to petitioner's claim (Pet. 18-24) that the trial court improperly forced the jury to find on three extra counts after it had reached a finding on one count. When the jury reported to the court that it had found on one count with respect to petitioner, the nature of the finding—whether guilty or not guilty—was not disclosed.

Nothing in the supplemental charge given at this point can fairly be said to have had any tendency to produce anything less than a unanimous verdict based on the independent judgment of each juror. This proposition may best be demonstrated by the comparison of the charge given here with the ones at issue and disapproved in the three cases on which petitioner relies, *United States* v. *Rogers*, 289 F. 2d 433 (C.A. 4); *Powell* v. *United States*, 297 F. 2d 318

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las' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, (C.A. 5), decided May 19, 1967.

[3] The district court case upon which petitioner relies (Pet. 14), *United States* v. *Turzynski* (N.D. Ill.), decided June 2, 1967 (20 A.F.T.R. 2d 5004), is an aberrant opinion. See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D.N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa); *United States* v. *Schlinsky*, 261 F. Supp. 265 (D. Mass.), affirmed, June 6, 1967 (C.A. 1) (19 A.F.T.R. 2d 1597, 1599); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D. N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966 (19 A.F.T.R. 2d 641); *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa); *United States* v. *Neves* (S.D.N.Y.), decided April 28, 1967 (67-1 U.S.T.C. par. 9412).

(C.A. 5); and *Green* v. *United States*, 309 F. 2d 852 (C.A. 5) (Pet. 24).

Here the jury was not told at all that the minority should reexamine its views in light of those of the majority. Thus a critical element of the "Allen" charge was not present—although it was given in each of the cases cited above. Here the jury was told that no "juror should surrender his own conscientious convictions" and that each must act on "his own convictions and not a mere acquiescence in the conclusions of his fellow jurors * * *." In contrast, the dispositive defect in *Rogers* was that the trial court failed to charge "that no juror should yield his conscientious conviction." 289 F. 2d at 434. Nor did any element in the charge given here compare to the charge in *Powell*, "If you follow the principles of law given you by the Court and if you recall the evidence in this case you ought to be able to agree upon a verdict. * * *"[4] And here the charge objected to was not given before the jury began its deliberations, as happened in *Green*.

Certainly, then, the charge did not exceed the proper limits which this Court established in *Allen* v. *United States*, 164 U.S. 492. See *United States* v. *Kahaner*, 317 F. 2d 459, 484, fn. 18 (C.A. 2), certiorari denied *sub nom. Corallo* v. *United States*, 375 U.S. 835, and *Thaggard* v. *United States*, 354 F. 2d 735, 739 (C.A. 5), certiorari denied, 383 U.S. 958.

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[4] In *Powell* the trial court as well suggested that the jury pursue its deliberations even though the foreman, at 11:46 p.m., reported "most of us have already gotten pretty dull." 297 F. 2d at 320.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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